**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE**

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| *In re* | |
| ROBERT M. GRIFFITH, JR., | No. 94-21581 |
| | Chapter 7 |
| Debtor. | |
| MARGARET B. FUGATE, TRUSTEE, | |
| Plaintiff, | |
| *v*. | Adv. Pro. No. 95-2042 |
| MARK GROSECLOSE, | |
| Defendant. | |

# M E M O R A N D U M

APPEARANCES:


MARGARET B. FUGATE, ESQ.
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**MARCIA PHILLIPS PARSONS**
**UNITED STATES BANKRUPTCY JUDGE**

This is an action by the chapter 7 trustee, Margaret B. Fugate (the "Trustee"), seeking the avoidance and recovery of a preferential or, in the alternative, an unauthorized postpetition transfer to the defendant, Mark Groseclose. Previously, the Trustee moved for summary judgment, but that motion was denied without prejudice upon a procedural ground by order entered February 5, 1996. Now having remedied the procedural defect,[1] the Trustee has again moved for summary judgment, asserting that there are no genuine issues of material fact in dispute and that she is entitled to judgment as a matter of law. The court agrees and will grant the motion for summary judgment. This is a core proceeding. 11 U.S.C. § 157(b)(2)(E).

I.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file,

[1]On the prior motion for summary judgment, the Trustee relied upon copies of correspondence from the defendant which were furnished in response to a document request and unsworn responses to interrogatories from the defendant, none of which were submitted by an affidavit, to establish the elements of her *prima facie* case. With the renewed motion, the Trustee has filed an affidavit which authenticates the copies of correspondence and responses to interrogatories as having been supplied by the defendant to the Trustee in response to discovery.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994), *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505 (1986). *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), *rehearing denied* (1990). Although the defendant filed no response to the Trustee's first motion for summary judgment, he has filed an objection to the present motion. However, the objection merely makes the conclusory assertion that the Trustee has not "shown all the elements of a preferential transfer pursuant to 11 U.S.C. 547" and restates the contention set forth in the defendant's answer that the defendant is entitled to a setoff pursuant to ll U.S.C.§ 553 "as there existed a mutual debt that arose before the commencement of the Bankruptcy Case and not subject to any of the exceptions of Section 553 of the Bankruptcy Code." No facts are alleged in the objection in support of these allegations.

II.

The following facts are established by the record, which includes the Trustee's affidavit, correspondence between the Trustee and the defendant, defendant's responses to interrogatories, and documents produced by the defendant in response to the Trustee's request for production of documents. The underlying chapter 7 bankruptcy case was filed by the debtor on October 14, 1994. The defendant's immediate past relationship with the debtor was as an independent contractor, whose job was to obtain sales for the debtor's cabinet business known as Cabinet Combinations, pursuant to an agreement between the debtor and the defendant dated July 17, 1992. For compensation, the defendant was to receive commissions on these sales. As evidenced by the defendant's correspondence to the debtor on August 18, 1994, the defendant was owed outstanding commissions and had made demand upon the debtor for payment in full prior to the debtor's bankruptcy filing. From that correspondence it also appears that the defendant claimed that the debtor was indebted to him under a sales contract, presumably which involved the sale of the cabinet business to the debtor. The defendant admits in his letter to the Trustee of December 14, 1994, that to settle his dispute with the debtor and in satisfaction of the outstanding commissions and other

amounts which he was owed under the sales contract, an agreement was reached between the debtor and the defendant whereby the defendant would retain the monies which were owed to the debtor's business by Mark and Debbie Fontaine on an account receivable which apparently resulted from a sale generated by the defendant. A few days prior to the debtor's bankruptcy filing, the defendant received a check on or about September 28, 1994, in the amount of $5,374.99, representing payment by the Fontaines of that account receivable. For some reason, that check was returned and another check, this one in the amount of $5,300.00, was received by the defendant on or about October 27, 1994, several days after the debtor's bankruptcy filing. It is unclear whether the checks were sent directly to the defendant from the Fontaines or if they were forwarded to the defendant from the debtor.

The Trustee contends that the defendant's acceptance of payment on the debtor's account receivable was preferential in that the defendant received an initial check of $5,374.99 within the ninety days prior to the bankruptcy filing, or it was an unauthorized postpetition transfer when the second, revised check for $5,300 was received by the defendant after the

bankruptcy filing.[2] The defendant does not dispute the factual basis of the Trustee's action, but denies that the transfer to him was preferential. And, as noted above, the defendant maintains that he is entitled to a setoff pursuant to 11 U.S.C. § 553.

III.

11 U.S.C. § 547(b) provides in pertinent part as follows:

> [t]he trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
> (A) on or within 90 days before the date of the filing of the petition; ... and
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Since the defendant has not affirmatively challenged the insolvency of the debtor within the ninety days preceding the

[2]In her complaint filed on August 23, 1995, the Trustee did not plead a cause of action under 11 U.S.C. § 549 for the avoidance and recovery of a postpetition transfer, only that the transfer was avoidable and recoverable as a preferential transfer under 11 U.S.C § 547(b). Apparently, it was only though discovery that the Trustee then learned of the second, revised check to the defendant.

bankruptcy filing, the presumption of insolvency during that period of time is conclusive. *See* 11 U.S.C. § 547(f). Of course, the remaining burden of proving the avoidability of a transfer under § 547(b) lies with the Trustee. *See* 11 U.S.C. § 547(g).

Applying the elements of § 547(b) to the facts in this case, the record establishes that these elements have been met. The transfers to the defendant were on account of the antecedent debt owed by the debtor to the defendant--the July 17, 1992 agreement which obligated the debtor to the defendant for the payment of certain commissions. The defendant admitted in his December 14, 1994 letter to the Trustee that he was retaining the funds from the Fontaines in satisfaction of the amounts owed to him.

The requirement that the transfer be made within ninety days of the date of the filing of the bankruptcy petition is also established even though the defendant for some unknown reason returned the first check sent to him and did not receive the revised second check (the one he retained) until after the debtor's bankruptcy filing. As set forth above, the defendant made demand on the defendant for payment in an August 18, 1994 letter. Between the time of that letter and September 28, 1994 when the first check was sent to the defendant, the debtor and

the defendant reached an agreement that the defendant could collect and retain the Fontaine account receivable owned by the debtor in satisfaction of the debt owed to the defendant by the debtor. Although it is not entirely clear whether this account receivable was formally assigned to the defendant, that was the apparent intent of the debtor and the defendant, and the defendant received the payment as if the account receivable had been assigned. As a result, this agreement between the debtor and defendant, made sometime between August 14, 1994 and September 28, 1994, wherein the debtor apparently transferred to the defendant his interest in the Fontaine account receivable, constituted a transfer of property of the debtor within the ninety days prior to the debtor's bankruptcy filing on October 14, 1994, to a creditor for payment on an existing antecedent debt.

Because insolvency of the debtor is presumed during that period of time, the only remaining question to establish all of the elements of §547(b) is whether the agreement which involved the transfer of the account receivable allowed the defendant to receive more than he would receive under chapter 7 if the transfer had not been made. In this regard, the Trustee states in her affidavit that she has liquidated the nonexempt assets of the debtor with the exception of the claim asserted herein, that

the debtor's schedules reflect total priority claims of $2,000.00 and unsecured debts of $102,454.61, and that unsecured creditors will not receive a dividend of fifty-eight percent, which is the approximate percentage that the defendant received on his antecedent debt. There being no other evidence to the contrary, the last element of § 547(b) is also satisfied and all the requirements of a preferential transfer have been met.

In the alternative, the transfer to the defendant of the $5,300 check on October 27, 1994, may be avoided and recovered by the Trustee pursuant to 11 U.S.C. § 549(a) which provides, *inter alia*, that "the trustee may avoid a transfer of property of the estate...that is not authorized under this title or by the court." To the extent that the prepetition agreement between the debtor and the defendant to compromise the defendant's claim against the debtor did not constitute a transfer of the Fontaine account receivable to the defendant, the account receivable and any proceeds therefrom became property of the estate upon the filing of this bankruptcy case. No authorization was given by this court that these funds could be transferred to the defendant. Accordingly, the transfer of the $5,300 check to the defendant is avoidable by the Trustee.

With respect to the defendant's assertion that he is entitled to a setoff pursuant to 11 U.S.C.§ 553 because there

”existed a mutual debt that arose before the commencement of the Bankruptcy Case”, the defendant has not come forward with any evidence whatsoever which would establish that a mutual debt existed between the debtor and the defendant prior to the debtor’s bankruptcy filing. Without question, the account receivable owed by the Fontaines to the debtor is not such a debt. Fed. R. Civ. P. 56(e) provides, in pertinent part: “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him. *See also Kochins v. Linden-Alimak, Inc*., 799 F.2d 1128, 1133 (6th Cir. 1986).

The defendant has not presented to this court any facts or evidence showing that there is a genuine issue for trial with respect to the setoff question. His mere assertion that he is and was entitled to a setoff is insufficient as a matter of law to preclude summary judgment and therefore must fail.

IV.

For the foregoing reasons, the Trustee's motion for summary judgment will be granted and the settlement agreement between the debtor and defendant entered into within ninety days prior to the bankruptcy filing will be avoided and set aside as a preferential transfer and the postpetition transfer to the defendant of $5,300 will be avoided pursuant to 11 U.S.C.§ 549(a). The Trustee will be awarded judgment against the defendant in the amount of $5,300.00, representing the proceeds received by the defendant as a result of the preferential transfer or unauthorized postpetition transfer.

FILED: March 28, 1996

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE